Supreme Court of the United States

October Term, 1976
No. 76-577

HUGO ZACCHINI,
Petitioner,

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Supreme Court has jurisdiction under 28 U.S.C. §1257(3) to review a decision of the Ohio Supreme Court which creates a common law right of publicity and establishes two specific limitations on that right based upon the free speech and press guarantees of Article I, Section 11 of the Ohio Constitution and the First Amendment to the Federal Constitution.

2. Whether the constitutional guarantees of free speech and press, relied upon by the Ohio Supreme Court in imposing limitations on Ohio's common law "right of

publicity", privileged Respondent's single news use of a fifteen second film clip of Petitioner's public performance which was a matter of legitimate public interest.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS PETITION WHICH WERE NOT REPRODUCED BY PETITIONER

Constitution of Ohio—Article I, Section 11:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

United States Code, Title 28, Section 1257(3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

* * * * *

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case adequately presents the history of this action, however undisputed facts relevant to the Ohio Supreme Court's decision were not clearly stated. These facts are as follows:

In August and September of 1972, Petitioner, Hugo Zacchini, regularly performed his "human cannonball" act for members of the general public attending the Geauga County Fair, in Burton, Ohio (App. pp. 54-55).* His performance lasted about fifteen seconds during which he was projected out of a cannon-like object into a net some two hundred feet away (App. pp. 54-56). No separate admission fee was charged to view his act, rather his performance was staged in an open grandstand area for the benefit of all persons in general attendance at the fair (App. pp. 54-55).

On September 1, 1972, a freelance news reporter for Respondent attended the Geauga County Fair and filmed Petitioner's performance over his verbal objection (App. pp. 54-55). Petitioner's act had generated substantial public interest at the fair and, in keeping with Respondent's commitment to present a broad range of news and information to the public, Respondent determined that plaintiff's act, as publicly performed, would be of interest to its viewers and would call the public's attention to the fair's attractions by informing its viewers of a special feature (App. pp. 54-56). Promoters of the fair encouraged news

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*The following abbreviations will be used throughout this brief:

Pet. p. .....: The Petition for Writ of Certiorari;

App. p. .....: The Appendix to the Petition for Writ of Certiorari.

coverage of Respondent's act, all reporters and cameramen being admitted to the fair *without charge* so that the fair would receive publicity from the news coverage (App. pp. 55-56).

Respondent broadcast a fifteen second news film clip of Petitioner's act *once* on its eleven o'clock Eyewitness News program on September 1, 1972 (App. p. 56). While the film clip was being shown newscaster David Patterson described the act as a "thriller" which "you really need to see . . . *in person* . . . to appreciate it . . ." (App. p. 57).

REASONS FOR DENYING WRIT

The writ of certiorari should be denied for each of the following separate and independent reasons:

1. No Title, Right, Privilege or Immunity Is Specially Set Up or Claimed Under the Constitution, Treaties or Statutes of the United States.

Petitioner has totally ignored the threshold requirement of 28 U.S.C. §1257(3) that there must be a Federal right which has been infringed by the decision of the state court before this Supreme Court has jurisdiction to review it. In this case Petitioner's only claim is that the Ohio Supreme Court, in recognizing a performer's "right of publicity", imposed unreasonable restrictions on it (Pet. p. 21).

The decision of the Ohio Supreme Court establishes that under the common law of Ohio "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy . . ." (App. p. 2). In formulating its decision

the Court had to consider and decide not only whether Ohio should recognize such a common law right but also what restrictions, limitations and defenses should apply to that right.

Implicit in the Ohio Supreme Court's power to recognize new common law rights is the power to define the perimeters of these rights. Surely the power to determine that Ohio will recognize a cause of action for invasion of the right of publicity carries with it the obligation on the Ohio Supreme Court to delineate both the prerequisites to such a claim and the privileges which constitute defenses thereto.

The issue sought to be reviewed by Petitioner does not concern any title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or statutes of the United States. 28 U.S.C. §1257(3). Rather Petitioner asks that this Supreme Court review the common law of Ohio and render an opinion on the propriety of the limitations placed on that right by the Ohio Supreme Court. Petitioner's complete disregard of the requirement that a federal right be infringed before this Court may exercise jurisdiction is highlighted by Petitioner's own statement that "[s]hould review be granted, direction can be focused upon the formulation of an appropriate standard to replace that adopted by the Ohio Supreme Court" (Pet. p. 21). Petitioner's plea, that this Supreme Court intervene in the development of Ohio's common law rights which have no federal basis, demonstrates the absence of a jurisdictional basis for this appeal. Review of the sort sought by Petitioner is not contemplated by Section 1257(3).

Respondent respectfully submits that this Supreme Court lacks jurisdiction to review this case.

2. The Ohio Supreme Court's Decision Was Founded Upon an Adequate and Independent State Ground.

In seeking review by the Ohio Supreme Court Respondent's first proposition of law read as follows:

> A television station is privileged under Article I, Section 11 of the Ohio Constitution and the First Amendment to the Federal Constitution to film a public performance by a "human cannonball" and broadcast a fifteen second film clip of the performance on its news program. (*See* Pet. p. 5).

This proposition of law focused upon the strong protection granted to speech and publication by Ohio's Constitution as well as the free press guarantees of the First Amendment. Although the guarantees of Article I, Section 11 of the Ohio Constitution parallel those of the First Amendment they are nevertheless separate and independent and represent Ohio's deep commitment to the principles of free speech and free press. For nearly forty years state courts in Ohio have followed the principle of law applied by the Ohio Supreme Court in this case, that "the right to privacy does not prohibit publication of matter which is of public or general interest." *Johnson v. Scripps Publishing Co.*, 32 Ohio L. Abs. 423, 431, 18 Ohio Ops. 372 (C.P. Cuyahoga Co. 1940); *Martin v. F.I.Y. Theatre Co.*, 26 Ohio L. Abs. 67, 10 Ohio Ops. 338 (C.P. Cuyahoga Co. 1938).

The Ohio Supreme Court's response to Respondent's first proposition of law was direct and encompassed both the state and federal free press guarantees:

> A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual (App. p. 2).

This Court has repeatedly stated that it will not review state court judgments based upon an adequate and independent nonfederal ground, even where a federal question is involved. *Murdock v. Memphis*, 87 U.S. 590, 634-636 (1874); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908). As Justice Jackson wrote in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. (citation omitted) * * * The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *And our power is to correct wrong judgments, not to revise opinions.* We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion. (Emphasis added).

In limiting the common law right of publicity in Ohio, the Ohio Supreme Court drew upon both state and federal constitutional guarantees. In such cases a presumption arises that the decision is based upon the nonfederal ground if the record is adequate to support it. *Durley v. Mayo*,

351 U.S. 277, 281 (1956). "And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it." *Williams v. Kaiser*, 323 U.S. 471, 477 (1945).

The issues before the Ohio Supreme Court in this case were essentially issues of state law. The Ohio Supreme Court considered and dismissed Petitioner's claims based on state law theories of conversion and common law copyright. The Court then concluded that Petitioner stated a claim under state law for invasion of the right of publicity but held that this common law right was limited where the matter reported was of public interest.

The limitations placed on common law rights are best determined by the highest court of the state. The Ohio Supreme Court has concluded that free speech and press guarantees properly limit the extent of Petitioner's claim.

It is respectfully submitted that this Court does not have jurisdiction to review these limits.

3. The Limitations Placed on Ohio's Common Law Right of Publicity Are Consistent With First Amendment Protection Accorded the Press in the Gathering and Dissemination of News.

Even though not reviewable by this Court, the decision of the Ohio Supreme Court in this case is consistent with the applicable decisions of this Court. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964), this Court first articulated the constitutional standard that a public official is precluded from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" —that is, with knowledge that it was false or with reckless

disregard to whether it was false or not. This principle of constitutional law was founded on a profound national commitment to debate and discussion of public issues and a recognition that in presenting the news the press must be given breathing space in its choice and manner of presentation. *Id.* at 271-272.

In *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967), this Court determined that all public figures should come within the purview of the "Times Rule". In the same year, in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the "Times Rule" was applied to a suit based on the "false light" theory of the right of privacy. In *Hill, Id.* at 387-388, this Court held that:

> [T]he constitutional protections for speech and press preclude the application of the New York (right of privacy) statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

The Ohio Supreme Court properly held that the underlying principle of *Time, Inc. v. Hill* "is that freedom of the press inevitably imposes certain limits upon an individual's right of privacy." (App. p. 12). The Court determined that this principle should govern right of publicity actions arising under the common law of Ohio. Justice Brennan's words in *Time, Inc. v. Hill, supra* at 388-389, therefore reflect not only the required federal constitutional limitations but also provide a basis for the limitations which the Ohio Supreme Court determined should govern right of publicity actions in Ohio:

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy govern-

ment. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. . . . We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. "The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]." Winters v. New York, 333 U.S. 507, 510 . . .

Most recently, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court had occasion to consider a claim for damages for invasion of privacy caused by the publication of the name of a deceased rape victim. This case was the first opportunity for this Court to apply First Amendment protection to *truthful* reports which admittedly invaded a *private individual's* right to be free from public disclosure of private facts. Prior decisions of this Court had considered only the "false light" aspect of right of privacy which is more akin to defamation. *See e.g., Time, Inc. v. Hill, supra,* and *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

In *Cox, supra* at 496, this Court concluded that the First Amendment "will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." The essence of the Court's opinion in *Cox* is that truthful reports of public matters cannot form the basis for a right of privacy claim. Justice Powell, in concurring in the judgment, recognized the clear implication of the *Cox* decision:

Today's opinion reiterates what we previously have recognized, see *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964)—that the defense of truth is constitutionally required when the subject of the alleged defamation is a public figure. *Ante,* at 489-490. Indeed, even if not explicitly recognized, this determination is implicit in the Court's articulation of a standard of recovery that rests on knowing or reckless disregard of the truth. I think that the constitutional necessity of recognizing a defense of truth is equally implicit in our statement of the permissible standard of liability for the publication or broadcast of defamatory statements whose substance makes apparent the substantial danger of injury to the reputation of a private citizen. *Id.* at 498-499.

Petitioner argues that the decisions of this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Time, Inc. v. Firestone,* 424 U.S. 448 (1976), limiting the "Times Rule" to communications concerning public officials and public figures call into question the Ohio Supreme Court's use of the rationale of *Time, Inc. v. Hill, supra,* in formulating limitations on the right of publicity. Such is not the case. Both *Gertz* and *Firestone* concerned the application of the privilege to *admittedly defamatory falsehoods* concerning *private individuals.* In those cases the Court was concerned with the strong state interest in protecting its private citizens from defamatory publications. No similar state interest exists in this case, for the report is admittedly *truthful* and the subject is plainly a *public figure.*

That Respondent was constitutionally privileged to broadcast a fifteen second film clip of Petitioner's act cannot be disputed. In fact Petitioner concedes that "[t]here can be no doubt that defendant [Respondent]

is entitled to some privilege under the First Amendment." (Pet. pp. 20-21). Petitioner takes issue only with the extent of the privilege (Pet. p. 21). The Ohio Supreme Court's limitations on this privilege provide more than adequate protection against serious abuses of a performer's rights. If the actual intent of the news media is to appropriate the benefit of the publicity for private use then the privilege accorded the press in disseminating the news would not apply. Similarly if the actual intent of the broadcaster is to cause financial or other injury to the performer the privilege would not be effective. In an appropriate case these limitations on freedom of the press might very well be held by this Court to be too restrictive under the First Amendment.

Neither limitation is applicable in the instant case. The favorable treatment given Petitioner in the broadcast certainly refutes any claim that Respondent intended to cause Petitioner injury. Similarly, Respondent's single use of the film clip on its news program could hardly evidence an intention to appropriate the act for private benefit.

The Ohio Supreme Court's application of free speech and free press guarantees to the common law right of publicity is a reaffirmation of Ohio's concern that the press be given the breathing space it needs to survive. And the Court's limitations on the new found right of publicity are consistent with the federal constitutional principles of *New York Times Co. v. Sullivan, Time, Inc. v. Hill,* and *Cox Broadcasting Corp. v. Cohn.*

4. There Are No Special or Important Reasons for Review of This Case by This Supreme Court.

Rule 19 of the Rules of the Supreme Court of the United States provides, in part, that:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Petitioner has presented no special or important reasons for review by this Court and none exist. Rather several factors weigh heavily against the grant of the writ prayed for.

First, the facts of this case are extremely unique and there is little likelihood that a similar case will ever arise. A decision by this Court on these facts would have little, if any, general application.

Secondly, performers, such as Petitioner, have sufficient means to prevent media coverage if they really do not want it. They may require their promoters to include on tickets and programs an explicit prohibition against mechanical reproduction. Moreover, the news media has no interest in reproducing lengthy segments of an individual's performance. Petitioner's statement that the Ohio Supreme Court's opinion would protect the filming and broadcasting of an entire performance by the Cleveland Symphony (Pet. p. 21) is ludicrous for such an action would be evidence of an intention to appropriate the benefit of the publicity for non-privileged private use rather than news use (App. p. 2).

Thirdly, Respondent's use of the film clip of Petitioner's act was clearly *de minimis* and thus too insubstantial to warrant review by this Court. In *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y. 1970), a Federal District Court found that even *commercial* use of a forty-five second film clip of plaintiff's entire musical performance did not provide the basis for a claim under New York's right

of privacy statute. The Court's holding in *Man, supra* at 53 is directly in point here:

> Finally, the incidental use of plaintiff's forty-five second performance in defendants' motion picture of this public event is surely *de minimis*. Cf. University of Notre Dame du Lac v. Twentieth Century-Fox Film Corp., *supra;* Damron v. Doubleday, Doran & Co., 133 Misc. 302, 231 N.Y.S. 444 (Sup. Ct., N.Y. Co. 1928), aff'd 226 App. Div. 796, 234 N.Y.S. 773 (1st Dep't. 1929).

While the Ohio Supreme Court did not have to rely upon the *de minimis* theory in dismissing Petitioner's claim since the limitations placed by the Court on the right of publicity precluded recovery, the Court nevertheless suggested that Petitioner's claim was insubstantial (App. p. 14, Note 5).

Fourthly, this lawsuit has continued for over three years. During that period Respondent has expended considerable time and money in defense of its right to present the news. This and other Federal Courts have repeatedly recognized that to defend a claim for libel or invasion of privacy acts as a substantial deterrent to the free exercise of First Amendment rights. *Time, Inc. v. Hill, supra* at 389; *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir.), *cert. denied* 395 U.S. 922 (1969). "Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied* 385 U.S. 1011 (1967).

This case, which began in July of 1973, should finally be put to rest. By granting Petitioner's writ this Court would extend these proceedings at least another year and

further discourage Respondent in the exercise of its rights under the Ohio and Federal Constitutions.

Finally, this case is not a proper one for a consideration of the constitutional standards to be applied to invasion of privacy cases. Its facts are unique and unlikely to be repeated. It concerns a "bastard" form of the right of privacy and not the more fundamental right of privacy claims of intrusion, public disclosure or false light, all of which have a much more profound effect upon a private individual than the rarely considered right of publicity. While this Court has questioned the application of the "Times Rule" to false light cases involving private individuals in *Gertz, supra,* and *Cantrell v. Forest City Publishing Co., supra,* it has not suggested that limitations on common law rights may not be based upon free press guarantees. Moreover, the privilege to report on matters of public interest involving public figures has not been questioned by this Court.

CONCLUSION

First—This Court does not have jurisdiction to hear this case for each of two reasons:

A. Petitioner does not even assert, much less have, any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States; and

B. The decision of the Ohio Supreme Court which Petitioner asks this Court to review is based upon an adequate and independent non-federal ground.

Second—Even if jurisdiction were present, review would not be justified because:

A. The decision by the Ohio Supreme Court is essentially consistent with and certainly is not repugnant to the First Amendment decisions of this Court; and

B. Facts so unique and so inconsequential are no basis for this Court to deal with constitutional standards applicable to right of privacy cases.

Respondent respectfully submits that the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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